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MAY 24 2004

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CATHERINE MUELLER,

No. C 03-1688 MHP

Plaintiff,

v.

CNA GROUP LIFE ASSURANCE
COMPANY, PACIFIC COAST CARDIAC &
VASCULAR SURGEONS LONG TERM
DISABILITY PLAN, and DOES 1-50,
inclusive,

MEMORANDUM & ORDER
Cross Motions for Summary Judgment

Defendants.

Plaintiff Catherine Mueller brings this action against defendants CNA Group Life Assurance Company ("CNA")¹ and Pacific Coast Cardiac & Vascular Surgeons Long Term Disability Plan ("the Plan") to recover rehabilitation benefits under her employer's long-term disability policy. Now before this court are the parties' cross motions for summary judgment. After having considered the parties' arguments and submissions, and for the reasons set forth below, the court rules as follows.

BACKGROUND²

I. Mueller's Diagnosis

In 1996, Mueller awoke one morning with numbness on the left side of her face. Rodriguez Decl., Exh. 4 ("CNA") at 117. She was evaluated with head imaging studies, which were reportedly negative, and no specific treatment was administered. Id. The numbness improved but persisted

1 intermittently. Id. During the ensuing four years, she did not experience additional neurological
2 symptoms. Id.

3 In late 1999, Mueller became pregnant for the first time. Id. In December of that same year,
4 she had a spontaneous first-trimester miscarriage. Id. In February 2000, she noticed numbness in
5 her left foot. Id. Over the course of approximately two days, this numbness migrated to her other
6 foot and up her legs to her waist. Id. She had particular numbness in the perineal region, such that
7 she could barely feel herself voiding. Id. She also experienced associated paresthetic tingling in the
8 left arm and considerable discomfort in the feet with cold and electrical sensations. Id. Mueller was
9 initially evaluated by her primary care physician, Dr. Fred Marcus, and then referred to Dr. Charan
10 Singh. Id. While blood studies were normal, MRI studies of the brain and spinal cord showed
11 abnormalities. Id. Dr. Marcus later informed Mueller that she had multiple sclerosis and scheduled
12 a follow-up examination with the Department of Neurology at Stanford University Medical Center.
13 Id.

14 On March 29, 2000, Dr. Leslie Dorfman, Professor of Neurology and Director of the
15 Multiple Sclerosis Clinic at Stanford University Medical Center, reviewed an MRI brain scan of
16 Mueller. Id. Dr. Dorfman concluded that the history and imaging findings were consistent with the
17 relapsing and remitting form of multiple sclerosis. Id. at 118. He further noted that while the
18 disease was still quite mild, it would be in Mueller's best interest to begin suppressive
19 immunomodulatory therapy. Id. Dr. Dorfman also discussed issues related to lifestyle and symptom
20 management of multiple sclerosis and provided Mueller and her husband with informational
21 materials concerning multiple sclerosis.³ Id.

22 On February 28, 2001, Mueller saw Dr. Dorfman for a follow-up examination. Id. at 261.
23 Dr. Dorfman evaluated Mueller and reviewed a set of MRI studies undertaken earlier in the month.
24 Id. He concluded that "her condition has been relatively stable, but there has been some slight
25 disease activity over the past year in the thoracic spinal cord." Id. Mueller had been on
26 immunomodulatory therapy since her visit with Dr. Dorfman in March of 2000. Id. She had been
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1 suffering from adverse side effects associated with the therapy and, after consultation with Dr.
2 Dorfman, she decided to discontinue the therapy. Id.

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4 II. Mueller's Claim for Disability Benefits

5 Mueller was employed as a Patient Day Coordinator for Pacific Coast Cardiac & Vascular
6 Surgeons ("Pacific Coast"). Id. at 81. Her job description specifies that she is to meet and greet
7 patients, take patients into exam rooms, have patients get into gowns, and weigh patients and take
8 their vital signs. Id. She is also required to change unna boots and remove surgical staples on an as-
9 needed basis, pull patient charts, order office supplies, keep the patient exam room stocked, and
10 handle personal tasks for vascular physicians. Id.

11 In May 2000, Mueller decreased her work schedule from full-time to twenty-eight hours per
12 week to combat fatigue, numbness, and lower extremity pain. Id. at 86. Dr. Marcus submitted
13 information in support of Mueller's decreased work schedule. Id. at 87. On May 8, 2000, Mueller
14 filed a disability claim based on her decreased work schedule. Id. Dr. Marcus indicated on the claim
15 that Mueller was partially disabled due to multiple sclerosis and that her status was unchanged. Id.
16 On June 2, 2000, CNA wrote Mueller, approving her claim and explaining the disability benefits she
17 would receive under her employer's Income Protection Policy. Id. at 139. CNA commenced
18 payment of disability benefits to Mueller on a monthly basis. In April 2001, Mueller decreased her
19 work schedule from twenty-eight to twenty-four hours. Id. at 197. This decision was also fully
20 supported by Drs. Marcus and Dorfman. Id. at 321.

21 In June 2001, CNA hired MJM Investigations, Inc. ("MJM Investigations") to conduct three
22 consecutive days of surveillance of Mueller, document her activities before and after work, monitor
23 her ability to work, and call the insurance adjuster with daily updates. Id. at 211. From June 11,
24 2003, through June 13, 2003, a private investigator used a hidden camera to videotape Mueller's
25 activities before and after work. Id. at 212. The investigator videotaped Mueller traveling to and
26 from work in her car, visiting the gym (where she used a stair step machine) and returning a curling
27 iron at local grocery store. Id. Based on the investigation, Ana Rodriguez, a disability specialist at
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1 CNA, sent Dr. Marcus a letter requesting documentation to support Mueller's continuing disability.
2 Id. at 237. In particular, Rodriguez requested a copy of her most recent medical records, including
3 MRI testing, neurological evaluations, consultations and treatment. Id. She also requested a copy of
4 recent office visits from April 2001 to present. Id. On August 13, 2001, Mueller submitted the
5 February 28, 2001, report of Dr. Dorfman, as well as a CNA report filled out by Dr. Marcus. Id. at
6 258-61. Dr. Marcus' report indicated that Mueller was last seen on January 5, 2001, that she had an
7 MRI on February 2, 2001, and that her condition remained unchanged. Id. at 260. He recommended
8 that she continue with part-time work, as previously advised. Id.

9 In August 2001, CNA referred Mueller's file for review to Dr. Joseph J. Jares III of Elite
10 Physicians. Id. at 279-80. Dr. Jares reviewed Dr. Dorfman's progress notes, Dr. Marcus' progress
11 notes, and Dr. Singh's February 28, 2000, consultation. Id. at 284. Dr. Jares also reviewed the lab
12 results and MRI taken on February 28, 2000. Id. His assessment stated that Mueller's condition was
13 one of remitting and relapsing multiple sclerosis. Id. He concluded that she had "mild impairment
14 based upon her subjective complaints of fatigue," that her "neurological examinations have been
15 unremarkable," and that "the documentation does not support weakness, sensory loss, or reflex
16 abnormality." Id. at 285. According to Dr. Jares, the medical information which he received did not
17 support a specific neurological reason for preventing Mueller from working full-time. Id. at 287.

18 In addition to his assessment, Dr. Jares wrote to Dr. Marcus on September 5, 2001,
19 requesting Dr. Marcus' response to seven questions. Id. at 294. In response, Dr. Marcus explained
20 that the decision to decrease Mueller's work schedule to twenty-four hours per week was based upon
21 her endurance level. Id. at 296. Dr. Marcus added that rest and regular exercise had greatly helped
22 her in overcoming the symptoms of her disease; he further indicated that he and her attending
23 neurologist, Dr. Dorfman, had encouraged her to maximize her physical endurance. Id. Dr. Marcus
24 specifically stated that Mueller "did not have the endurance to work full time, and needs periods of
25 her day for rest as well as a regular exercise program," and that her "physical exercise in the gym has
26 been a recommended part of her therapeutic program." Id. Dr. Marcus' responses did not change
27 Dr. Jares' opinion. Id. at 297.

1 On September 24, 2001, CNA sent Mueller a letter explaining that they had determined that
2 Mueller's medical condition had improved and no longer precluded her from performing her
3 occupation on a full-time basis. Id. 298-300. CNA terminated payment of Mueller's benefits. On
4 November 12, 2001, Mueller appealed CNA's denial of benefits to CNA's appellate committee. Id.
5 at 310. On November 20, 2001, Dr. Marcus sent a letter to CNA, in which he explained that
6 Mueller's symptoms had progressed. Id. at 320. He further stated that "her MS symptoms have
7 clearly progressed, and her cutting back her work to 24 hours a week is perfectly appropriate, and
8 medically indicated. Her attempt to do as vigorous exercise as possible is in her best interest to
9 control her symptoms and again, in my opinion is medically indicated." Id. at 321. Dr. Marcus also
10 noted that Dr. Jares' report was factually inaccurate and that CNA's denial of benefits was
11 unsupported by known and well-documented medical facts. Id. Dr. Dorfman drafted a similar letter
12 to CNA, indicating that he concurred with Dr. Marcus and further explaining that, while it may be
13 technically accurate that Mueller's condition could permit full-time employment, this would not be
14 in her long-term best interests. Id. at 324. Drs. James Zimmerman, Vincent Gaudiani, and Paul
15 Cipriano of Pacific Coast also submitted letters to CNA explaining that Mueller was disabled and
16 could work only part-time. Id. at 325-27. All three doctors asked CNA to reconsider the decision to
17 deny benefits. Id. Jo Ann Riser, a business manager at Pacific Coast, wrote CNA as well,
18 explaining that she had personally witnessed Mueller's difficulty in handling a full-time work
19 schedule. Id. at 328-29. Riser noted that "on one particular day when we were extremely busy,
20 [Mueller] actually fell down as her feet gave way and buckled under her." Id. at 328. Michelle
21 Johnson, a registered vascular technologist at Pacific Coast, also submitted a letter explaining that
22 she had personally witnessed exacerbations of Mueller's condition around the office, including
23 fatigue, numbness, dragging of her left foot, and, on several occasions, ataxia. Id. at 330.

24 On January 8, 2002, Dr. Jares reviewed additional progress notes from Drs. Marcus and
25 Dorfman, as well as Mueller's job description from Pacific Coast. Id. at 356. He concluded that the
26 new clinical information did not alter his opinion. Id. at 357. On January 14, 2002, CNA informed
27 Mueller that its decision to deny her benefits remained unchanged. Id. at 359. On January 22, 2002,
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1 CNA's appellate committee upheld the termination of Mueller's benefits, and on January 23, 2002,
2 CNA drafted a letter stating that while it did not dispute her diagnosis, it had reviewed her medical
3 information and concluded that she was able to work in the capacity of a Patient Day Coordinator on
4 a full-time basis.⁴ Id. at 371-72.

5 On February 23, 2002, Mueller submitted updated medical information to CNA, including
6 progress notes from examinations conducted by Dr. Marcus on January 10, 2002, and Dr. Dorfman's
7 on February 2, 2002, and an MRI study from January 11, 2002. Id. at 385-90. Dr. Marcus' report
8 concluded that her symptoms were consistent with progressive multiple sclerosis. Id. at 385. Dr.
9 Dorfman's report explained that she continued to manifest two small areas of increased signal within
10 the subcortical white matter of the left cerebral hemisphere, lateral to the body of the left lateral
11 ventricle. Id. at 387. He further explained that Mueller's multiple sclerosis had been "gratifyingly
12 stable after some initial myelopathic symptomatology." Id. Dr. Jares reviewed the updated medical
13 information and again concluded that she was able to work on full-time basis. Id. at 397-98. On
14 March 23, 2002, CNA drafted a letter to Mueller explaining that the decision to terminate benefits
15 was proper and that the appellate review was now complete. Id. at 392-93.

16 Mueller subsequently filed a complaint with the California Department of Insurance. Id. at
17 522. Barbara Love, a Senior Insurance Compliance Officer, requested that CNA respond to a
18 number of the Mueller's concerns, including the fact that the company had made its decision based
19 upon a review of her medical records from a physician that had never examined Mueller.⁵ Id. at 422-
20 560. On July 30, 2002, CNA stated that they maintained their position that the termination of her
21 benefits was proper without an independent medical examination. Id. at 440. On August 5, 2002,
22 Mueller faxed a request for a second appellate review by CNA. Id. at 456.

23 On August 26, 2002, Dr. Eugene Truchelot reviewed Mueller's records at CNA's request. Id.
24 at 469. He stated that while a part-time work status seemed reasonable from a subjective standpoint,
25 "from the perspective which you specifically asked about, i.e., the medical findings presented in the
26 supplied records, these do not explain, strictly speaking, why the claimant would be able to perform
27 the same types of occupation activities which she is currently engaged in on a part-time basis, but not
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1 on a full-time basis.” Id. at 472. On August 29, 2002, CNA sent a letter to Mueller explaining that
2 they had conducted a second independent review and again concluded that the termination of
3 benefits was proper. Id. at 474-75.

4 On November 19, 2002, Dr. Marcus drafted a letter explaining that “Mueller has had clear-
5 cut changes in her symptoms from the initial diagnosis period” and that it “has been the medical
6 recommendation for more than one and one-half-years that Ms. Mueller increase her exercise to help
7 manage her symptoms.” Id. at 558. In addition, Dr. Marcus noted that he strongly believed a
8 reduced work schedule would help manage her pain. Id. On December 31, 2002, Dr. Dorfman
9 indicated his full support of Dr. Marcus’ letter. Id. at 559. On December 31, 2002, Mueller faxed
10 these letters to CNA along with a request that they consider the reinstatement of her disability
11 benefits. Id. at 556 -59. While CNA did have contact with the California Department of Insurance
12 following Mueller’s request, they do not appear to have responded to Mueller’s facsimile. On March
13 27, 2003, Mueller filed suit in California state court, and defendants removed the case to this court
14 on April 17, 2003.

15
16 LEGAL STANDARD

17 I. Summary Judgment

18 Summary judgment is proper when the pleadings, discovery and affidavits show that there is
19 “no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter
20 of law.” Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the case.
21 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is
22 genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving
23 party. Id. The moving party for summary judgment bears the burden of identifying those portions of
24 the pleadings, discovery and affidavits that demonstrate the absence of a genuine issue of material
25 fact. Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986). On an issue for which the opposing party
26 will have the burden of proof at trial, the moving party need only point out “that there is an absence
27 of evidence to support the nonmoving party’s case.” Id. at 325.

1 Once the moving party meets its initial burden, the nonmoving party must go beyond the
2 pleadings and, by its own affidavits or discovery, “set forth specific facts showing that there is a
3 genuine issue for trial.” Fed. R. Civ. P. 56(e). Mere allegations or denials do not defeat a moving
4 party’s allegations. Id.; see also Gasaway v. Northwestern Mut. Life Ins. Co., 26 F.3d 957, 959–60
5 (9th Cir. 1994). Nor is it sufficient for the opposing party simply to raise issues as to the credibility
6 of the moving party’s evidence. National Union Fire Ins. Co. v. Argonaut Ins. Co., 701 F.2d 95, 97
7 (9th Cir. 1983). If the nonmoving party fails to show that there is a genuine issue for trial, “the
8 moving party is ‘entitled to judgment as a matter of law.’” Celotex Corp., 477 U.S. at 323 (quoting
9 Fed. R. Civ. P. 56(c)).

10
11 II. Judicial Review of ERISA Disability Claims

12 The Plan at issue in this case is a defined benefit plan subject to the provisions of the
13 Employment Retirement Income Security Act (“ERISA”). 29 U.S.C. §§ 1001 et seq. A denial of
14 ERISA benefits is reviewed de novo unless “the benefit plan gives the administrator or fiduciary
15 discretionary authority to determine eligibility benefits or construe the terms of the plan.” Firestone
16 Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). Under Firestone, the default presumption
17 is that the administrator has no discretion and must show that the plan confers discretionary
18 authority. Kearney v. Standard Ins. Co., 175 F.3d 1084, 1089 (9th Cir. 1999) (en banc). If the
19 benefit plan confers discretion on the administrator, the abuse of discretion standard applies. See
20 Bendixen v. Standard Ins. Co., 185 F.3d 939, 942 (9th Cir. 1999); McClure v. Life Ins. Co. of North
21 America, 84 F.3d 1129, 1132 (9th Cir. 1996).

22 Under the abuse of discretion standard, the court’s review is limited to the administrative
23 record, and the decision of an administrator will not be disturbed unless the court determines that the
24 decision was arbitrary or capricious. See McKenzie v. Gen. Tel. Co. of Cal., 41 F.3d 1310, 1316
25 (9th Cir. 1994); Clark v. Wash. Teamsters Welfare Trust, 8 F.3d 1429, 1431 (9th Cir. 1993). “The
26 touchstone of arbitrary and capricious conduct is unreasonableness.” Id. at 1432. In contrast, under
27 the de novo standard, the normal summary judgment standard applies, and the district court may
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1 grant summary judgment if there are no genuine issues of material fact in dispute. Tremain v. Bell
2 Ind., 196 F.3d 970, 978 (9th Cir. 1999).

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4 DISCUSSION

5 I. The Governing Policy

6 The first question the court must confront is whether the policy confers discretionary
7 authority upon the administrator. Defendants argue that the 2001 certificate of insurance applies to
8 Mueller's claim and confers discretionary authority upon CNA. Plaintiff contests the applicability
9 and effect of the 2001 certificate of insurance. Pacific Coast originally entered into a long-term
10 disability insurance policy with CNA in 1986. Two certificates of insurance were also submitted by
11 defendants. According to Rodriguez, a CNA disability specialist, the first certificate of insurance
12 was effective as of 2000, and the second certificate was effective as of 2001.

13 Neither the original policy nor the first certificate confer discretionary authority upon the plan
14 administrator. The second certificate states on the opening page, "When making a benefit
15 determination under the policy, *We* have discretionary authority to determine *Your* eligibility for
16 benefits and to interpret the terms and provisions of the policy." Rodriguez Decl, Exh. 4, cover page
17 (emphasis in original). While this language unambiguously attempts to confer discretionary
18 authority on CNA, defendants have not demonstrated that the 2001 certificate of insurance applies to
19 Mueller's disability claim. Defendants cite Grosz-Salamon v. Paul Revere Life Ins. Co., 237 F.3d
20 1154 (9th Cir. 2001), for the proposition that "an ERISA cause of action based on a denial of
21 benefits accrues at the time the benefits are denied." Id. at 1159. Defendants contend that because
22 CNA terminated Mueller's disability benefits in 2001, the 2001 certificate of insurance applies to the
23 claim. In Grosz-Salamon, Paul Revere and the plaintiff's employer amended the insurance policy
24 applicable to plaintiff's disability benefits. Id. at 1157. Paul Revere subsequently issued a Benefits
25 Summary which, unlike its predecessor, granted discretionary authority to Paul Revere in construing
26 and interpreting the policy. Id. The employer never executed an agreement authorizing this change.
27 Id. In determining whether the abuse of discretion standard applied, the court concluded that while
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1 the later plan conferred discretionary authority on the plan administrator, the provision in the
2 Benefits Summary was invalid for two reasons. Id. at 1161. First, the original policy was fully
3 integrated, and a unilateral change in the Benefits Summary was insufficient to alter the terms of the
4 original policy. Id. Second, the original policy required changes to be signed by the policyholder.
5 Id. Because the original policy did not confer discretionary authority upon the plan administrator,
6 the court concluded that the de novo standard of review applied. Id. at 1162.

7 The 2001 certificate of insurance does not apply to Mueller's denial of benefits. The original
8 policy entered into between CNA and Pacific Coast states that certificates of insurance will be
9 provided to each insured person and will describe the benefits of the policy, to whom they are
10 payable, the policy limitations, and where the policy may be inspected. Rodriguez Decl., Exh. 1.
11 The policy also purports to be fully integrated. It provides, in relevant part, "This policy, the
12 Application of the Holder, Clinic Applications, enrollment cards of Insured Persons (if any), and the
13 evidence of insurability (if any) of each Insured Person will comprise the entire contract between the
14 parties." Id. at Part XIV, pg. 10. Neither clause provides that future certificates of insurance would
15 alter the rights or duties of the parties. Id. Further, because the original policy was fully integrated,
16 subsequent certificates of insurance unilaterally issued by CNA without the policyholder's
17 authorization would not be binding on the parties. See Grosz-Salamon, 237 F.3d at 1162.

18 At oral argument, CNA argued that the original policy allowed CNA to change any of the
19 benefit provisions of the policy subject to one-year advance notice to the policyholder. See
20 Rodriguez Decl., Exh. 1 at Part I, pg. 1. After argument, CNA submitted a declaration—with
21 attachments—suggesting that a January 26, 2001, letter adequately (and lawfully) changed the
22 policy, notifying the policyholder of a shift to "abuse of discretion" review. See Nelson Decl., at
23 Exhs. A & B (claiming to make the "new" policy effective March 1, 2001); cf. Roser Decl., at ¶ 5
24 (claiming that the letter was never received). But CNA's letter nowhere mentions "abuse of
25 discretion" review. Id. Nor does it otherwise qualify as a legitimate change to the policy—even by
26 the terms of CNA's own policy. Nothing in CNA's letter suggests that CNA provided the requisite
27 one-year advance notice to the policyholder of any change to the policy. See Rodriguez Decl., Exh.
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1 1 at Part I, pg. 1; Nelson Decl., at Exh. A (making the changes “effective” less than two months after
2 they were announced). And nothing in CNA’s submission suggests that the policyholder assented to
3 any changes made—regardless of when or how they were communicated. Id. As a consequence, the
4 original policy, rather than the subsequently-issued certificate of insurance, govern Mueller’s
5 disability claim. The original policy does not confer discretionary authority upon the administrator;
6 therefore, the de novo standard of review applies to Mueller’s claim. See Kearney, 175 F.3d at 1089.

7
8 II. Denial of Benefits

9 The second question before this court is whether CNA improperly terminated Mueller’s
10 disability benefits.⁶ Under the de novo standard, the court reviews the record to determine whether a
11 genuine issue of material fact exists. See Kearney, 175 F.3d 1090; Para v. Life Ins. Co. of North
12 America, 258 F. Supp. 2d 1058, 1064 (N.D. Cal. 2003) (Jenkins, J.).⁷ According to the record,
13 Mueller’s treating physicians, Drs. Marcus and Dorfman, recommended that she work on a part-time
14 basis and exercise regularly. While courts cannot require administrators to automatically accord
15 special weight to the opinion of a treating physician, neither can they arbitrarily refuse to credit a
16 claimant’s reliable evidence, including the opinions of a treating physician. Black & Decker
17 Disability Plan v. Nord, 538 U.S. 822, 123 S.Ct. 1965, 1972 (2003).

18 In this case, CNA’s decision to disregard the opinions of Mueller’s treating physicians and to
19 terminate her benefits is not supported by the record. Mueller’s treating physicians reported that she
20 did not have the physical endurance to work on a full-time basis, recommending that she exercise
21 regularly in order to combat the symptoms of her disease. Despite her treating physicians’
22 recommendations and substantial evidence favoring Mueller’s disability claim, CNA elected to
23 terminate Mueller’s benefits. Mueller’s claim was supported not only by her physicians, who treated
24 her over the course of several years, but also by objective and subjective medical evidence, evidence
25 from her co-workers and supervisors, who were also doctors, and information from the Multiple
26 Sclerosis Society. In contrast, CNA has presented only the opinions of two physicians that neither
27 reviewed Mueller’s complete medical record nor examined her personally. Because CNA did not
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1 base its decision to terminate Mueller's benefits on sufficient reliable evidence in the record, CNA's
2 decision to terminate Mueller's benefits was unreasonable.⁸

3 CNA's original decision to terminate benefits was based upon Dr. Jares' August 2001 report
4 and the videotape from MJM Investigations. CNA at 298-99. The videotape from MJM
5 Investigations merely revealed that Mueller exercised regularly at the gym, using cardiovascular
6 equipment. Rodriguez Decl., Exh. 6. Drs. Marcus and Dorfman had recommended that Mueller
7 exercise regularly as part of her treatment in order to overcome the symptoms of her disease. CNA
8 at 321, 324. In particular, Dr. Marcus stated that Mueller's "attempt to do as vigorous exercise as
9 possible is in her best interest to control the symptoms, and again, in my opinion is medically
10 indicated." Id. At 321. Further, included in the record was a pamphlet from the Multiple Sclerosis
11 Society, which encouraged a wide range of exercise activities including swimming, walking or
12 jogging, and lifting weights, as well as the use of treadmills, stair steppers, stationary bicycles, and
13 cross-country ski machines. Id. at 331-44. Dr. Jares never suggested that the opinions of either Dr.
14 Marcus or Dr. Dorfman with regard to regular exercise were incorrect. Defendants have failed to
15 present any other evidence which would contradict the opinions of her treating physicians. Any
16 reliance by CNA on the videotape recorded by MJM Investigations is unfounded.

17 In addition, Dr. Jares reviewed the progress and consultation notes of Mueller's treating
18 physicians, as well as the lab results and MRI taken on February 28, 2000. Dr. Jares did not review
19 Mueller's February 2001 MRI, nor did he perform an independent medical examination of Mueller.
20 While independent medical examinations are not required, they are common in ERISA cases. See
21 Grosz-Salamon, 237 F.3d at 1157; McKenzie, 41 F.3d 1313; Taft v. Equitable Life Assur. Soc., 9
22 F.3d 1469, 1470 (9th Cir. 1993). Here, while Dr. Jares concluded that Mueller had multiple
23 sclerosis, he stated that her symptoms were largely based on subjective complaints. CNA at 285.
24 According to Dr. Jares, the medical information he received did not support a finding that Muller
25 could not work full-time for neurological reasons. Id. at 286. It is unclear how Dr. Jares made such
26 a determination without reviewing Mueller's complete medical record or conducting an independent
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1 medical examination of her. Nevertheless, based on Dr. Jares' conclusions, CNA elected to
2 terminate benefits. Id. at 298-99.

3 The review of Mueller's medical records by Dr. Truchelot following Mueller's appeal is also
4 unconvincing. Dr. Truchelot reviewed a portion of Mueller's records and concluded that her part-
5 time status seemed reasonable from a subjective standpoint: "from the perspective which you
6 specifically asked about, i.e., the medical findings presented in the supplied records, these do not
7 explain, strictly speaking, why the claimant would be able to perform the same types of occupational
8 activities which she is currently engaged in on a part-time basis, but not on a full-time basis." Id. at
9 472. Dr. Truchelot, like Dr. Jares, never performed an independent medical examination of Mueller.
10 His conclusions also appear to be based on an incomplete medical record. See id. at 469-70.
11 Finally, Dr. Truchelot never firmly concluded that Mueller was able to work on a full-time basis. He
12 only stated that the medical records with which he was supplied do not suggest that she would be
13 able to work on a part-time, but not a full-time, basis. Id. at 472. This does not support CNA's
14 decision to terminate benefits.

15 Defendants have not pointed to sufficient evidence in the record to support CNA's decision
16 to terminate Mueller's benefits. CNA failed to conduct an independent medical examination or have
17 a doctor review Mueller's complete medical record. In addition, the videotape that defendant has
18 submitted to support its decision does not contradict the recommendation by Mueller's physicians
19 that she should engage in regular and vigorous exercise. Based upon this court's thorough
20 examination of the record, CNA improperly terminated Mueller's benefits.

21 Even if this court were to conclude that the abuse of discretion standard applies, CNA abused
22 its discretion in denying Mueller's benefits. See Zavora v. Paul Revere Life Ins. Co., 145 F.3d 1118,
23 1123 (9th Cir. 1998) ("Although we recognize that an ERISA administrator is entitled to substantial
24 deference, it still must have some reasonable basis for its decision denying benefits."); Atwood v.
25 Newmont Gold, 45 F.3d 1317, 1323-24 (9th Cir. 1995) ("It is an abuse of discretion for an ERISA
26 plan administrator to make a decision without any explanation . . . or that is based on clearly
27 erroneous findings of fact."). CNA had no reasonable basis for denying Mueller's benefits. Rather,
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1 CNA based its decision solely on the opinions of two physicians and a videotape of Mueller
2 exercising and running errands. But the videotape demonstrated that Mueller was abiding by the
3 recommendations of her doctors, and the opinions of the CNA's physicians contradicted not only
4 Mueller's treating physicians, but also the medical evidence supporting Mueller's physician's
5 positions, as well as direct evidence from her employer and co-workers. In fact, CNA A's physicians
6 neither reviewed Mueller's full medical record nor examined her. By terminating Mueller's benefits
7 without any reasonable basis for doing so, CNA abused its discretion.

8
9 CONCLUSION

10 For the foregoing reasons the court DENIES defendants' motion for summary judgment and
11 GRANTS plaintiff's motion for summary judgment. CNA is directed to immediately reinstate
12 Mueller's disability benefits. Plaintiff may also be entitled to an award of reasonable attorney's fees
13 and costs. See 29 U.S.C. § 1132(g). The court will entertain a separate motion for attorney's fees
14 and costs.

15
16 IT IS SO ORDERED.

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18 Dated: *May 24, 2004*


MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of California

ENDNOTES

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2 1. While defendants claim that Continental Casualty Company was erroneously sued under the name
3 CNA Group Life Assurance Company in the complaint, they to refer to the company as "CNA"
4 throughout the papers.

5 2. Unless otherwise noted, the facts are culled from the administrative record.

6 3. Prior to the diagnosis by Dr. Dorfman, Mueller began physical therapy with BAK Physical
7 Therapy. On May 10, 2000, a physical therapy report indicates that Mueller was discouraged with
8 her slow progress. The report also notes that she had difficulty in unweighting her left leg to step
9 and in her transitory gait.

10 4. The administrative record examined by CNA on appeal also included a pamphlet from the
11 National Multiple Sclerosis Society titled "Exercise as a Part of Everyday Life." CNA at 331-44.
12 The pamphlet explains that people with multiple sclerosis typically live with fatigue, weakness, and
13 lack of coordination, and that regular aerobic exercise can increase fitness, arm and leg strength,
14 workout capacity, improve bowel and bladder control, and reduce depression, fatigue, and anger. Id.
15 at 332. The pamphlet encourages a wide range of exercise activities including swimming, walking
16 or jogging, lifting weights, yoga, and t'ai chi. Id. at 333, 340-43. The pamphlet specifically
17 encourages the use of treadmills, stair steppers, stationary bicycles, and cross-country ski machines.
18 Id. at 342-43.

19 5. The Muellers also asserted that Ms. Mueller had discontinued immunomodulatory therapy
20 because of negative side effects, and replaced it, upon her doctors' recommendations, with
21 swimming and other exercise, NSAIDS for relief, and Elavil for sleep; that Mueller's exercise
22 included swimming, which did not correlate to the weight-bearing activities in which she engaged at
23 work; that the company's surveillance footage was an invasion of privacy and that Mueller only used
24 the stair stepper on a single occasion on account of the pool's closure; and finally that Mueller had
25 only missed four sick days in sixteen years of employment, and the company's insinuations the she is
26 a malingerer were adding to the stresses of her condition.

27 6. Under the original policy, "Partial Disability" means that the insured is under the care of a licensed
28 physician, "[g]ainfully employed in his regular or another occupation or Specialty on a partial and/or
part-time basis;" and "[a]ble to produce (earn) over 20 percent, but less than 80 percent of Pre-
Disability production (income)." Rodriguez Decl., Exh. 1. While defendants argue that the
definition of disability in the 2000 certificate of insurance is applicable to Mueller's claim, the
definition of disability under the 2000 certificate does not substantially differ from the original
policy, and would not alter the result in this case. The 2000 certificate provides, in relevant part, that
"[y]ou are considered disabled and eligible for benefits if, due to an accident or sickness which
causes loss commencing while your coverage is in force, you are unable . . . to perform all of the
material duties of your regular specialty (for doctors) or occupation (for other insured personnel) on a
full-time basis, but are performing at least one of the material duties of your regular
specialty/occupation or another occupation on a part-time or full-time basis, and currently earning

1 less than 80% per month of your pre-disability earnings due to that same injury or sickness.”
2 Rodriguez Decl., Exh. 3.

3 7. While the court has discretion to review additional evidence, this discretion should only be
4 exercised where the court finds that additional evidence is necessary to conduct a de novo review.
5 Mongeluzo v. Baxter Travenol Long-Term Disability Benefit Plan, 46 F.3d 938, 943 (9th Cir. 1995).
6 The evidence in the administrative record in this case is sufficient to conduct a de novo review of
7 Mueller’s claim. Were the court to consider additional evidence, that evidence would not alter the
8 decision in this case. The only additional evidence submitted by defendants is that Mueller increased
her work week from twenty-four hours per week to twenty-five in order to qualify for coverage under
the plan. This one-hour increase is de minimis and does not demonstrate that Mueller was not
disabled within the meaning of the plan.

9 8. The court does not reach this holding purely because plaintiff has presented evidence of treating
10 physicians, and defendant has offered the opinion of nontreating physicians. Rather, the court
reaches this conclusion based on the totality of the evidence offered by the parties.
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